IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE, R.S.O. 1980, CHAPTER 340, AS AMENDED;

AND, IN THE MATTER OF THE COMPLAINT MADE BY KEN MORIN, DATED MARCH 8,. 1985, ALLEGING DISCRIMINATION IN EMPLOYMENT ON THE BASIS OF AGE AND MARITAL STATUS AGAINST NORANDA INC. AND I.G. BARRIE, HEMLO PROJECT

INTERIM AWARD

Board of Inquiry: Dr. D.J. Baum

Appearances:

Noranda Inc. -
R.J. Drmaj, Counsel
K.G. Hughes, Counsel

Commission -
Michael Fleishman, Counsel

Mr. Barrie, *pro se*

Mr. Morin, *pro se*

Hearings: April 11 and May 10, 1988 at Toronto, Ontario

Mr. Drmaj, Counsel for Noranda, Inc., raised a preliminry objection to hearing the complaint on April 11, 1988. He asked that the complaint be dismissed because of unreasonable delay on the part of the Commission. The grounds for his position included reference, at least by analogy, to *The Charter of Rights and Freedoms, The Statutory Powers Procedure Act, R.S.O. 1980, Ch. 484,* and *The Human Rights Code.*

Mr. Drmaj submitted his arguments as well as a supportive casebook. Mr. Fleishman asked for and was given without objection time to review and answer those arguments. Counsel agreed that before the next scheduled hearing they would attempt to set out stipulated facts relevant to the preliminary objection. Both Messrs. Barrie and Morin agreed to this procedure; both understood that they had the right to make representations in connection with any submission of counsel.

At the hearing on May 10, 1988, counsel submitted the following agreed statement of facts which was received and marked as an exhibit:

> 1. In June 1984, the Respondent, Noranda Inc., placed in several newspapers an advertisement seeking application for the position of Security Co-ordinator.
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> 2. A number of applications, including that of the Complainant in this matter, were received by the Respondent, Noranda Inc. The Complainant, Ken Morin, forwarded his application on or about July 14th, 1984.
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> 3. These applications were considered by Noranda Inc. and a successful candidate was chosen. The Complainant, Ken Morin, was not the successful candidate and was so advised by a letter from the Respondent, Noranda Inc. in August of 1984.
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> 4. The Respondent, Noranda Inc., invited the Complainant, Ken Morin, to provide permission for them to consider his application for other positions in the secuirty field.
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> 5. The Complainant in August 1984 advised the Respondent, Noranda Inc., that he agreed to being considered for different

positions where the Respondent felt he was qualified.

6. On or about December 19th, 1984, and thereafter, the Respondent Employer advised the Complainant that he was being considered for another position and he and his wife were invited to attend at Noranada Inc.'s site on or about January 9th, 1985. He further participated in interviews conducted by the team chosen to fill the positions and viewed housing accommodation which would be provided if he were offered the position with the Respondent Company.

7. On or about January 11th, 1985, the Complainant was advised that he would not be hired for any of the positions.

8. The Complainant filed his Complaint with the Human Rights Commission on March 27th, 1985.

9. The Respondent Employer replied by reply April 3, 1985.

10. A fact finding conference was conducted on May 24, 1985 in an attempt to resolve the complaint. All parties were represented at the fact finding conference.

11. As the complaint was not resolved at the fact finding conference stage, the Commission conducted an extended investigation on issues which remained in dispute between the parties.

12. On September 23d, 1985, the Respondent Corporation acknowledged and responded to the Commission's request.

14. On November 8th, 1985, a summary of the Investigating Officer's extended investigation was disclosed to the Respondents and the Respondents replied to that summation by correspondence dated November 28th, 1985.

15 . The investigation and its summary were forwarded to the Commission on December 5th, 1985 with a request as to whether or not a Board of Inquiry would be established. The Respondent Employer was advised of this on this same date.

16. The Commission's file was then referred to its Legal Department for a legal assessment of the merits of the complaint.

17. The Human Rights COmmission by way of letter to Mr. Barrie on August 21st, 1987 advised that a Board of Inquiry would be appointed. The Respondent, Noranda Inc., learned of this at or about the same time.

18. On or about August 31st, 1987, the Respondent Employer immediately filed with the Chairman of the Ontario Human Rights Commission their objection to the legthy delay to appoint the Board of Inquiry and requested that a hearing should not be established in this matter.

19. On September 11th, 1987, the Chairman of the Commission responded to the Respondent Employer's objection advising that the objection had been referred to Commission's legal counsel.

20. The Commission's counsel responded to the said objection by correspondence dated October 14th, 1987.

21. The Board of Inquiry was appointed on December 29th, 1987.

22. The Board of Inquiry was convened by way of conference call on Tuesday, January 26th, 1988. The issue of delay was not raised by the Respondent on that occasion.

23. To complete the information in this matter, the Board of Inquiry should be aware that Noranda, Inc.-Hemlo Project is an enterprise of the Respondent Employer situated in North-western Ontario. It is a mining project which has taken a preliminary gold discovery through the construction stages of developing a mine at the site. The mine produces valuable minerals, principally gold.

The area involved is somewhat isolated and of the pioneering mode in that there are no long established permanent facilities or premises. By its very nature and set up, the phase of

construction and change-over to permanency creates a transient work force. This results in a difficulty for the administration of personnel, their records and whereabouts. These difficulties are recognized by both parties although it is a fact and acknowledged the Respondent Employer has been able to locate and engage the services of witnesses and assemble appropriate documentation. The parties further recognize and agree that delay creates a continuing difficulty of remembering incidents and instances of activity taking place in the past.

24. All people involved in the hiring which is the subject matter of this complaint were management personnel of the corporate Respondent, and therefore would be less transient than the general work force.

25. Noranda Inc. was aware throughout that this complaint was outstanding and was not advised by the Commission to the contrary at any time.

Following discussion and argument relating to the import of the agreed upon statement of facts, Mr. Barrie spoke on his own behalf. He indicated that the most serious aspect of the delay between the filing of the complaint and hearing went to his capacity to recall the questioned events. The fact is, he said, that there simply may be a great deal that he will not remember because of time.

II

I think it useful at this point to set forth the conclusions that I have drawn from the agreed statement of facts and arguments relating thereto.

Measure of Time

First, there is the measure of time. Mr. Drmaj would have the time measured from the time Mr. Morin forwarded his application for employment, July 14, 1984. Mr. Fleishman, however, would have the time measured from the date of the complained acts of discrimination against Mr. Morin as set forth in the complaint which was filed on March 8,1985.

There is little doubt in my mind that the appropriate point for measuring time in relation to Commission delay in these proceedings should be from the date of the practices alleged to be discriminatory as set forth in the complaint. Mr. Fleishman emphasized in the strongest possible terms that the alleged discriminatory practices relate to the denial of the second opportunity for employment as described in paragraphs 11 and 12 of the complaint:

> 11. On or about January 11, 1985, Mr. Barrie called me and informed me that they were not going to offer me the position.
>
> 12. When questioned as to why, Mr. Barrie stated that "they do not feel you are compatible with the team they are assembling. You know, the young guy, old guy routine, not your technical knowledge."

Mr. Fleishman acknowledged that other paragraphs in the complaint do refer to Mr. Morin's first bid for employment. Mr. Fleishman assured the Board of Inquiry, however, that the Commission in all respects will limit its evidence to the denial of employment as described in paragraphs 11 and 12 of the complaint. The only exception will be the introduction of Mr. Morin's resume which was tendered to Noranda Inc. in connection with his first attempt to obtain a position.

At pages 27-28 of the transcript for May 10, 1988, Mr. Fleishman stated:

> . . . There was no complaint with regard to the first refusal [of employment]. It was simply an assessment by the company. The Complainant certainly had no feeling that there was any violation at that time. It [the alleged violation] was on the specific facts of his second consideration [for a position].
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> THE CHAIRMAN: Then . . . as I understand it . . . there was an application that was made at an early date, and that resulted in the second invitation, or in the invitation in terms of the second date . . . . [I]n connection with the first application, there was a resume filed and that resume was as applicable to the second [job position], as it was to the first . . . .
>
> MR. FLEISHMAN: That is correct.

Prompt Response of Respondents to Commission Enquiries and Commission Delay

It is clear from the agreed statement of facts and Mr. Fleishman's own candid comments that Noranda, Inc., *at every stage of the proceedings, up to the point of the establishment of this Board of Inquiry,* promptly responded to all Commission requests for information and reply. It is also clear that Noranda Inc., while it knew that the complaint against it hadn't been dismissed, also did not know the disposition the Commission intended until August 21, 1987.

The last advice Noranda Inc. and Mr. Barrie had from the Commission before its decision to establish a Board of Inquiry in 1987 was on December 5, 1985. By any measure this must be seen as a lengthy period. There is absolutely nothing in the agreed statement of fact or in the arguments made by Commission Counsel that go to explain or justify the delay. In this regard, it must be assumed, bearing in mind the agreed statement of facts and the reality of an extended Commission investigation, that the Commission had to be aware of potential difficulty in the presentation of evidence, especially where credibility might be a factor.

Yet, having said this, it should also be stated that the parties have been able to gather their witnesses and the documents, albeit with no small measure of difficulty, necessary for the presentation of their respective positions. Yet, in two respects it is possible that the factor of delay in time might adversely impact on the Respondents' capacity to effectively defend themselves:

1. Mr. Drmaj said that to the extent possible the Company has attempted to sift and preserve those documents necessary to defend against the complaint. However, he added the Company did not know what documents the Commission would be relying upon, and that lack of knowledge might make it difficult to go back in time and find other clarifying materials.

   Mr. Fleishman answered that the Respondents already have been supplied with documentation upon which the Commission intends to rely. Further, he noted that if any supporting documentation incident to the prosecution of the complaint would be supplied to the Respondents on request. Mr. Fleishman

stated at pages 36-37 of the May 10th transcript:

> Similarly, here, the Respondent was made aware, as set out in the Agreed Statement of Facts, of the nature of the complaint, and a full investigation took place. Documentation was provided, and the request for further documentation by the Commission was made, and that documentation was also provided, as is indicated in the exhibits which have been filed in the Respondent's brief.
>
> The documentation was, of course, preserved, and at least if the Respondents didn't preserve it after that point, the Commission certainly did, and a portion of the documentation which will be relied upon [by the Commission] at the hearing will certainly be provided to my friend prior to the hearing if he wishes to obtain it.

Bearing in mind the possibility that the matter may go forward to hearing and the submission made by Mr. Fleishman, noted above, I asked and Mr. Fleishman agreed to supply Respondents all documentation upon which the Commission intends to rely no later than the close of business on Friday, May 13, 1988.

2. Mr. Drmaj and Mr. Barrie raised the question of witness memory. A considerable period of time has passed between when the alleged discriminatory acts occurred and hearing on this matter. Shouldn't the passage of that time have an effect on conclusions that might otherwise be drawn as to credibility?

Mr. Barrie, speaking for himself, stated at pages 61-62 of the Transcript for the hearing on May 10th:

> "... [T]he time of the delay ... in excess of three years, certainly tends to reduce my ability to remember the details clearly. The decision at the time to hire or not hire potential employees, was based on many ... persons' decisions, and with a large turnover, it is very

> hard to have everyone recall his impressions of this particular incident. I can honestly say that I don't even remember the people that were involved in the interview process .... Nor do I know if the interview documents are available to me. I haven't seen any kind of documentation on this case at any time other than letters from the Commission saying there was going to be a hearing. Nothing has been directed to me. With the lengthy time delay, it is very difficult to recall details of the conversation with the complainant, and also, I would like to point out there is some hardship on me. I am living in Northern British Columbia. A one-day hearing is a three-day situation away for me from my present employment. And, this delay has certainly made it very difficult for me to accurately present even my case.

Certainly, the fact of a substantial amount of time passing between the questioned act and the hearing over which the Responents are blameless cannot weigh against them in terms of a good faith failure to remember. Mr. Fleishman, Commission Counsel, said as much at pages 31-32 of the transcript for May 10th:

THE CHAIRMAN: Do you agree ... that delay can be taken into account in terms of credibility of evidence, and in terms of remedy?

MR. FLEISHMAN: I do, Mr. Chairman, and I think that's the proper place for that consideration to be made. Indeed, in my correspondence to the Respondent, which my friend has included at Tab 10 of the Material, which is dated October 14th [1987], I state that the Board of Inquiry may consider the issue of the alleged delay, and any consequences thereof at the hearing.

As a finding of fact, I can accept the conclusion that the passage of time can dim memory. To the extent that the delay in bringing this complaint to hearing was not the cause of the Respondents, they certainly cannot be faulted for any good faith failure of memory. Surely, no adverse inference as to

their credibility can be drawn from such a failure.

But, just as surely, I am unable to draw a conclusion of any kind at this stage of the proceedings as to failed or dimmed memory. I do not *now* know as a fact that there are any material points of evidence about which the memory of witnesses has lapsed *because of the passing of time.*

I emphasize that I have commented on the facts as I now know them. I do not know what the evidence will be once the matter goes forward for hearing on the merits which will be the effect of my ruling on the preliminary objection. Indeed, it may be that at some later point in the proceedings Respondents will be able to demonstrate that a direct effect of the delay occasioned has made it impossible for them to defend themselves. Though I will say more about this possibility in the next section of this Interim Award, it will suffice to note that I would be open on such a showing to a motion by Respondents for appropriate relief.

III

The Preliminary Objection in Perpsective

Considerable emphasis has been placed on the facts in my approach to the preliminary objection. My reasons for doing so spring from the nature of *The Human Rights Code.* It is remedial, not punitive legislation. As such, it is to be given a purposive reading. Complaints are not to be dismissed before hearing unless on the face of *uncontested facts* they have no basis in law. One must also bear in mind that while a complaint is designed to vindicate a public interest, it frequently does so through an individual who believes himself/herself aggrieved. The effect of allowing a preliminary motion to dismiss is to disallow the Complainant an opportunity to be heard.

There is, of course, another basis for such a narrow rendering of a motion to dismiss. It is related to the statutory nature of a Board of Inquiry. I am appointed by the Minister, and I must function under the relevant provisions of *The Human Rights Code*. Professor McCamus stated in *Hyman v. Southam Murray Printing Limited and International*

Brotherhood of Teamsters, Local 419 (1982), 3 C.H.R.R. D/617, at ¶ 5619:

> . . . [D]elay in initiating or processing a complaint should not be considered a basis for dismissing the complaint at the outset of the proceedings before a board of inquiry unless it has given rise to a situation in which the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred. Having been assigned, by order of the Minister of Labour, a statutorily defined task of undertaking an inquiry to ascertain certain facts, the board of inquiry should proceed to attempt to do so, notwithstanding the passage of considerable time, unless the passage of time has made fulfillment of its task impossible.

As will become apparent in the next sub-section of this Interim Award, I differ with one aspect of Professor McCamus' statement: The concern of a Board of Inquiry must encompass not only the question as to whether the Commission can prove its case, but also the capacity of the Respondents to defend themselves because of Commission action, namely, unreasonable delay.

Time Limits and *The Human Rights Code*

The Human Rights Code does set forth certain time limits in connection with the filing of a complaint and the initiation of hearing by a Board of Inquiry.

Section 33(1)(d) provides: "Where it appears to the Commission that, (d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay, the Commission may, in its discretion, decide to not deal with the complaint."

Under the Agreed Statement of Facts, there is no dispute that Mr. Morin, the Complainant, filed his complaint within the time limits set out by section 33(1)(d). In passing, I note that even if he had not filed the complaint within the statutory time-frame, the Commission still had

discretion as to whether to proceed.

Section 38(1) imposes on the Board of Inquiry an obligation to proceed to hearing within thirty days from the date on which it was appointed. Again, the Agreed Statement of Facts makes it clear that this obligation was met.

The sections noted are specific. As a matter of statutory interpretation, it can be argued that specificity rules out the possibility of any inter - pretation of a general provision within *The Human Rights Code* permitting a complaint to be dismissed because of unreasonable delay.

However, that is not the end of the matter. It is one thing to say that the Code contains no provision permitting dismissal of a complaint because of unreasonable delay. It is quite another thing to say that the Code permits the Commission to use unreasonable delay in a way which denies the Respondents the ability to defend themselves.

The Respondents' Right to Defend Themselves

The Statutory Powers Procedure Act, , R.S.O. 1980, Ch. 484, (The SPPA) is binding upon the parties. It is general legislation which sets out the procedure by which hearings are to be conducted. *The SPPA* contains a number of provisions which are directed toward ensuring a respondent's right to reply.

For example, §8 of *The SPPA* is particularly applicable here. It provides: "Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with *reasonable information* of any allegations with respect thereto."

The allegations in this matter involve claims of discrimination. These go to the good character and propriety of conduct of the Respondents. §8 of *The SPPA* applies. The obvious purpose of providing reasonable information before a hearing is to allow the Respondents the opportunity to know and to meet the claims made. Implicit in §8 must be warning and information at a sufficiently early time to permit response.

§10 of *The SPPA* affords parties the basic rights present their case through counsel and to cross-examination of witnesses. Sub-sections (b)

and (c) provide: "A party to proceedings may at a hearing, (b) call and examine witnesses and present his arguments and submissions; (c) conduct cross-examinations of witnesses at a hearing reasonably *required for a full and fair disclosure of the facts* in relation to which they have given evidence."

How can there be meaningful cross-examination if as a result of the Commission's undue delay the means have been denied the Respondents? How can there be a presentation of its side of the case if as a result of the Commission's undue delay the means have been denied the Respondents?

Finally, lest there be any doubt of the general powers of a tribunal under *The SPPA* to control its proceedings, and in that regard assure that the ends of *The SPPA* are achieved, §23(1) provides: "A tribunal may make such orders or give such directionsin proceedings before it as it considers proper to prevent abuse of its processes."

In *Quereshi v. Central High School of Commerce and the Board of Education for the City of Toronto (1988) 9 C.H.R.R. D/4527 at ¶35253 (Rotushny)*, it was stated: "This subsection [23(1)] appears to provide jurisdiction to dismiss a complaint for reason of delay. However, the delay would have to approach the standard of an abuse of the processes of the tribunal. No such delay could be said to exist in the case before us. Nor is there any specific or substantial prejudice related to the delay which did occur."

Mr. Drmaj would enlarge the reading of *The SPPA* in terms of the power of a Board of Inquiry to dismiss a complaint for unreasonable delay. While noting that *The Charter of Rights and Freedoms* does not, as such, apply at this point to the proceedings, he nevertheless would read some its rights, that is, the definitions going into fundamental justice, into how a tribunal should exercise its power to prevent abuse of process.

I am inclined to accept what the Board of Inquiry said in *Quereshi, supra, at ¶s 35254 to 35258:*

> Counsel for the respondent also asserted that the delay in this case constituted a contravention of sections 7 and 11(b) of the *Canadian Charter of Rights and Freedoms*.

The section 11(b) argument is based on the assertion that under the Ontario *Human Rights Code*, the respondent is facing a "penal matter" and is, therefore, in the position of a person "charged with an offence." Counsel for the respondent sought to distinguish the decision of *Kodellas v. Saskatchewan Human Rights Commission (1987) 8 C.H.R.R. D/3712*. There Mr. Justice McLellan of the Saskatchewan Court of Queen's Bench concluded that proceedings under the Saskatchewan Code:

> . . . do not constitute charging the respondent to the complaint with an offence within the meaning of section 11 of the *Charter*. The proceedings are not criminal or penal in nature.

The argument based on section 7 of the Charter relies upon the *Kodellas* decision. It was pointed out that there the delay was much less than in the present case. Yet, the court applied section 7 to prohibit a board of inquiry from proceeding. The court accepted the argument that the delay *prevented the respondent from presenting a full answer and defence to the complaint by damaging his ability to marshall and present evidence*.

However, the court pointed out that each case must be examined separately:

> Here we are concerned with incidents alleged to have occurred in a restaurant. Employees in the restaurant industry are very transitory. Those employees are the witnesses that the applicant says are crucial to his case.

In the matter before me, the Respondents have been able to marshall witnesses. Moreover, the Commission has undertaken to provide well in advance of hearing on the merits all documentation upon which it will be relying in proof of its case.

There has been undue delay in the sense that a great deal of time has passed which the Commission either has not or cannot explain. There is little doubt that the Respondents have been inconvenienced because of

that delay. There may well be an effect on witness memory because of the delay. All of these points will be taken into consideration in weighing credibility and in fashioning a remedy.

Finally, it may well be that the Respondents find at some point in the proceedings that the undue delay simply has made it impossible for them to present evidence material to their defence. Should that point arise, I will consider an appropriate motion from Respondents.

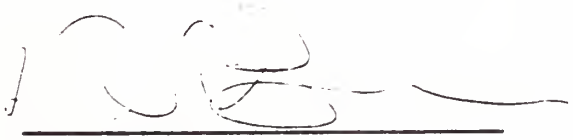
In so ruling I emphasize that this matter is far different from that in *Commercial Union Assurance v. Ontario Human Rights Commission (1987) 87 CLLC ¶17,029 (Ont. Supreme [Divisional] Court).* There the court quashed a decision to appoint a board of inquiry following an earlier ruling rejecting such a request. Key to the court's ruling was the fact that a key witness had died; this vitally affected the respondent's capacity to present their case and the court so stated at page 16,312.

AWARD

For the reasons stated above, and subject to the conditions set out therein, the preliminary objection of the Respondents is denied. Hearing on the merits will take place on July 25, 28, and 29, 1988 at 10:00 a.m. each day at 180 Dundas Street West, Toronto, Ontario.

IT IS SO ORDERED.

DATED THIS 26th DAY OF MAY, 1988 AT TORONTO, ONTARIO.



Dr. D.J. Baum
Board of Inquiry